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No. 99-1011

In the

Supreme Court of the United States

KNIGHT PUBLISHING COMPANY, d/b/a *THE CHARLOTTE OBSERVER*, and JOHN HECHINGER
Petitioners,
v.
PRESBYTERIAN HEALTH SERVICES CORP.
Respondent.

On Petition for Writ of Certiorari to the to the Supreme Court of North Carolina

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, AND THE SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF THE PETITIONERS

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Under Supreme Court Rule 37.2(b), the Reporters Committee for Freedom of the Press and the American Society of Newspaper Editors move the Court to allow them to file their *amici curiae* brief in support of the petitioners, which follows this motion.

Petitioner Knight Publishing Company has consented to the filing of the attached brief. Respondent Presbyterian Health Services Corporation has withheld its consent to the filing of the attached brief.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The American Society of Newspaper Editors is a professional organization of more than 900 persons who hold positions as directing editors of daily newspapers in the United States and Canada.

The Society of Professional Journalists is a voluntary nonprofit journalism organization representing every branch and rank of print and broadcast journalism. SPJ is the largest membership organization for journalists in the world, and for more than 90 years, SPJ has been dedicated to encouraging a climate in which journalism can be practiced freely, fully, and in the public interest.

Amici curiae are journalists who report on matters of public concern. This case concerns an issue critical to the media specifically and the public in general: whether legislation can cut off public access to broad categories of civil litigation. Indeed, the media has been involved in this case since the trial level, where a reporter unsuccessfully objected to a motion for closure and requested a continuance to contact his attorney. In response to his efforts, he was ejected from the courtroom. The reporter's newspaper then unsuccessfully sought to intervene in the case for the limited purpose of opposing closure. The trial court rejected its efforts without holding a hearing.

In establishing the public's presumptive constitutional right of access to attend criminal trials, this Court has discussed the public policy reasons supporting access. Those reasons include but are not limited to the following: that openness ensures the accountability of our civil justice system, improves the functioning of a trial, provides an outlet for public concern, improves the public's understanding and acceptance of the judicial system, improves informed public debate, fosters an appearance of fairness, and permits the public to serve as a check on the judicial process.

These public policy factors also favor a presumptive right of access to civil trials. For better or worse, many of the most critical public policy battles are now fought through civil litigation. The front pages of America's newspapers are filled with stories about antitrust litigation against software companies, product liability litigation against cigarette companies and automobile manufacturers, toxic tort litigation against chemical manufacturers, class action lawsuits concerning breast implants, and wrongful death lawsuits against people acquitted of criminal murder charges. This phenomenon is hardly new. As this Court noted in discussing the history of civil rights litigation, "[I]n some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases." *Gannett Co. v. DePasquale*, 443 U.S. 368, 387 n.15 (1979).

If the North Carolina decision is allowed to stand, members of the public could be excluded from any broad category of cases that the legislature deemed improper for public purview. For example, a legislature could pass a statute mandating a closed courtroom for all lawsuits brought by the attorney general or against the state. Under the North Carolina Supreme Court's reasoning, such a statute would preempt the

First Amendment right of access for the public to all trials falling within those categories.

Given the broad ramifications of a decision in this area for First Amendment interests, *amici curiae* respectfully request that this Court grant it leave to file the attached brief.

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INTEREST OF *AMICI CURIAE*[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors

[1] Under Supreme Court Rule 37.6, counsel for *amici curiae* state that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amici curiae* made a monetary contribution to the preparation and submission of this brief. A motion for leave to file this brief was filed under Supreme Court Rule 37.2(b).

that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

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SUMMARY OF ARGUMENT

The media's interests in the outcome of this case can hardly be overstated. At trial, a judge overruled a reporter's objection to a motion for closure on the hearing of pending summary judgment motions, denied a request for a continuance for the reporter to contact his attorney, and then ejected the reporter and closed the courtroom. On the following day, the trial court denied a motion for intervention without allowing a hearing. Despite the absence of any of the procedural steps necessary to close a courtroom, the North Carolina Supreme Court affirmed the trial court's rulings, finding that the presumption of openness in civil proceedings under the state and federal constitutions did not create a right for the public to argue against the closure of a courtroom, and that the state statute concerning medical review committee

materials mandated closure of the proceedings and sealing of the records without the necessity of a hearing.

In *Richmond Newspapers, Inc. v. Virginia* and its progeny, this Court looked in part to public policy arguments when it established the First Amendment right-of-access framework for criminal trials. In the 20 years since the Court issued *Richmond Newspapers*, a plethora of federal and state appellate courts have looked to those same public policy arguments in finding that the right of access also applies to civil litigation. Indeed, even the North Carolina Supreme Court's decision here acknowledged that the First Amendment right of access would apply to this civil case.

This Court's decisions make clear that a presumption of access applies to criminal cases, and that a trial court can overcome that presumption only by allowing the public an opportunity to be heard before closure and then issuing specific findings of fact showing that a compelling government interest justifies denying access and that the denial of access is narrowly tailored to achieve that goal. The presumption of openness and procedural safeguards have been extended to civil cases as well.

But in this case, the North Carolina trial court did not acknowledge the public's right of access to attend the civil trial. It gave the media entity seeking access no opportunity to be heard on the issue of closure of the courtroom. It issued no findings of fact that attempted to justify its closure of the court and its decision to disregard the constitutional right of access. And it did not explain how its remedy—complete closure of the courtroom—constituted a narrowly tailored solution to the situation.

The North Carolina Supreme Court noted the aforementioned facts but held that the state statute concerning peer review records trumps the constitutional right of access. According to the court, the statute's applicability in a lawsuit eliminates any need to give the public a right to be heard and for the trial court to issue findings of fact explaining why a First Amendment right of access has been overcome in this particular case. The North Carolina Supreme Court has allowed a trial court to subordinate a First Amendment right to a state confidentiality statute without holding a hearing and making any findings that attempt to justify the decision.

The North Carolina Supreme Court is attempting to allow the closing of broad categories of civil litigation from the public, and by doing so it has abridged the public's First Amendment rights.

ARGUMENT

I. This Court has recognized the public's First Amendment right of access for criminal cases.

A. This Court used historical and public policy factors to support a right of access.

In a series of cases beginning in 1980, this Court held that the public has a First Amendment right of access to attend criminal trials and related criminal proceedings.[2] In reaching its conclusion, the Court first "considered whether the place

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[2] *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press-Enterprise I*); *Waller v. Georgia*, 467 U.S. 39 (1984); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*); *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993).

and process have historically been open to the press and the general public." *Press-Enterprise II*, 478 U.S. at 8 (citing *Globe Newspaper*, 457 U.S. at 605 and *Richmond Newspapers*, 448 U.S. at 589). Second, it "considered whether public access plays a significant positive role of the functioning of the particular process in question." *Id.* (citing *Globe Newspaper*, 457 U.S. at 606).

B. This Court has established procedural safeguards to protect the right of access.

In *Richmond Newspapers* and its progeny, this Court has established procedural requirements that must be carried out before closing a courtroom. *See generally* C. Thomas Dienes et al., *Newsgathering and the Law* § 2-3 (2d ed. 1999) (describing the necessary procedural steps that trial courts must take under the litany of U.S. Supreme Court right of access decisions).

"[F]or a case-by-case approach to be meaningful, representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'" *Globe Newspaper*, 457 U.S. at 609 n.25 (citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (Powell, J., concurring)). For the "opportunity to be heard" to be meaningful, some notice must be provided before the trial court closes a courtroom. *See, e.g., United States v. Cojab*, 996 F.2d 1404, 1408 (2d Cir. 1993) (holding that a hearing concerning closure cannot be held before the public has notice that the hearing will take place so that members of the public will have an opportunity to be heard).

If a trial court wants to close its courtroom following the hearing, it must issue specific findings of fact that "closure is essential to preserve higher values [than the constitutional

right of access] and is narrowly tailored to serve that interest." *Press-Enterprise II*, 478 U.S. at 13-14. One reason that this procedural component is so important is so "that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise I*, 464 U.S. at 510.

II. The constitutional right of access has been applied to civil litigation.

A. The factors that led to a right of access to criminal trials are identical for civil trials.

This Court has not ruled on whether the right of access applies to civil cases as well. Nevertheless, its opinions have discussed the similar historical background of both criminal and civil litigation and the similar public policy factors at issue in both criminal and civil litigation.

In 1979 in *Gannett Co. v. DePasquale*, this Court noted the striking similarities between the history of the public's right to attend civil and criminal trials:

> [H]istorical analysis . . . is equally applicable to civil and criminal cases . . . . For many centuries, both civil and criminal trials have traditionally been open to the public. As early as 1685, Sir John Hawles commented that open proceedings were necessary so "that truth may be discovered in civil *as well as* criminal matters" (emphasis added). *Remarks upon Mr. Cornish's Trial*, 11 How. St. Tr. 455, 460. English commentators also assumed that the common-law rule was that the public could attend civil and criminal trials without distinguishing between the two. *E. g.*, 2 E. Coke, *Institutes of the Laws of England* 103 (6th ed. 1681) ("all Causes ought to be heard . . . openly in the Kings Courts"); 3 W. Blackstone, *Commentaries*;

M. Hale, *The History of the Common Law of England* 343, 345 (6th ed. 1820); E. Jenks, *The Book of English Law* 73-74 (6th ed. 1967).

The experience in the American Colonies was analogous. From the beginning, the norm was open trials. Indeed, the 1677 New Jersey Constitution provided that any person could attend a trial whether it was "civil *or* criminal," *Concessions and Agreements of West New Jersey* (1677), ch. XXIII, *quoted in* 1 B. Schwartz, *The Bill of Rights: A Documentary History* 129 (1971) (emphasis added). Similarly, the 1682 and 1776 Pennsylvania Constitutions both provided that "all courts shall be open, 1 *Schwartz*, *supra*, at 140, 271 (emphasis added).

. . . In short, there is no principled basis upon which a public right of access to judicial proceedings can be limited to criminal cases if the scope of the right is defined by the common law rather than the text and structure of the Constitution.

Indeed, many of the advantages of public criminal trials are equally applicable in the civil trial context. While the operation of the judicial process in civil cases is often of interest only to the parties in the litigation, this is not always the case. *E. g., Dred Scott v. Sandford*, 19 How. 393; *Plessy v. Ferguson*, 163 U.S. 537; *Brown v. Board of Education*, 347 U.S. 483; *University of California Regents v. Bakke*, 438 U.S. 265. Thus, in some civil cases the public interest

> in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases.

Gannett, 443 U.S. at 386-87 n.15.

Since the issuance of *Richmond Newspapers* one year after *Gannett*, many members of this Court have noted that both the historical and functional component of the right-of-access framework lead to the conclusion that civil and criminal trials should be treated alike. *Richmond Newspapers*, 448 U.S. at 580 n.17 (stating that "whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open"); *Richmond Newspapers*, 448 U.S. at 599 (Stewart, J., concurring) ("The First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal."); *Press-Enterprise II*, 478 U.S. at 27 (Stevens, J., dissenting) ("[T]he logic of the Court's access right extends beyond the confines of the criminal justice system to encompass proceedings held on the civil side of the docket.").

B. Lower courts have held that a constitutional right of access applies to civil trials.

Perhaps because of the discussion of civil trials in *Gannett* and *Richmond Newspapers*, federal and state appellate courts have concluded that the access rights established by this Court in the criminal context also apply in the civil context.[3] Even

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[3] *See, e.g., Simmons v. Conger*, 86 F.3d 1080 (11th Cir. 1996); *United States v. A.D.*, 28 F.3d 1353, 1356 (3d Cir. 1994); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16 (2d Cir. 1984), (continued...)

the North Carolina Supreme Court in this case acknowledged that "[a]lthough the Supreme Court has never decided the question of whether the public has a First Amendment right to attend civil court proceedings or to view civil court records, the Court has noted that civil trials historically have been presumptively open to the public." *Virmani v. Presbyterian Health Services Corp.*, 515 S.E.2d 675, 695 (N.C. 1999) (citing *Richmond Newspapers*, 448 U.S. at 580 n.17, and *Gannett*, 443 U.S. at 386 n.15).

A reading of the federal and state opinions that conclude that the public enjoys a right of access to civil trials shows that the procedural safeguards found to be essential in the criminal context also apply to civil proceedings. For example, the U.S. Court of Appeals for the Eleventh Circuit described the type of procedural safeguards that it believed must be put in place before closing a civil trial:

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[3](...continued)
cert. denied, 472 U.S. 1017 (1985); *In re Iowa Freedom of Information Council*, 724 F.2d 658 (8th Cir. 1984); *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983); *Doe v. Santa Fe Indep. Sch. Dist.*, 933 F. Supp. 647, 650 (S.D. Tex. 1996); *NBC Subsidiary, Inc. v. Superior Court*, 9870 P.2d 337 (Cal. 1999); *Del Papa v. Steffen*, 915 P.2d 245 (Nev. 1996); *Hutchinson v. Luddy*, 581 A.2d 578, 581 (Pa. Super. 1990); *State v. Cottman Transmission*, 542 A.2d 859 (Md. App. 1988); *see generally NBC Subsidiary*, 980 P.2d at 358-59 ("No case to which we have been cited or of which we are aware suggests, much less holds, that the First Amendment right of access as articulated by the high court does not apply, as a general matter, to ordinary civil proceedings."); C. Thomas Dienes et al., *Newsgathering and the Law* § 3-2(a) (2d ed. 1999) (describing the holdings of federal and state courts that extended this Court's holdings about access to criminal trials to civil trials).

> There is nothing in this record that supports the closing of these proceedings to the press and public. The district court did not hold any hearing after proper notice, nor did it enter findings that justify any restrictions on public access to the proceedings. *See Globe Newspaper Co. v. Superior Court*, 102 S. Ct. at 2622, n.25 (the press must be afforded an opportunity to present its case for an open proceeding); *Gannett Co. v. DePasquale*, 443 U.S. at 401 (Powell, J., concurring) (same). See also Note, *All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records*, 52 Temp. L.Q. 311, 332 (1979). We commend to the trial courts the same procedure that has been recommended in a fair trial-free press context. See ABA, *Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press* (1976).
>
> Other procedures also might accomplish the purpose. . . . We do not bind the district courts to the formality of any set procedure. But the issue must be squarely confronted and those with various interests must be given the opportunity to be heard.

Graddick, 696 F.2d at 802; *see also Publicker Indus.*, 733 F.2d at 1070 (holding that before a court closes a civil courtroom it must show that a denial serves an important government interest, that no less restrictive way exists to serve that government interest, and that the court has made record findings in order to facilitate meaningful governmental review).

C. The North Carolina decision ignores the constitutional right of access to the civil courts.

Amici have previously explained that the newspaper reporter and his employer in this case took every possible step to have the court consider the public's interest in keeping the courtroom open: they complained about the efforts to close the courtroom, requested that the court delay the trial so that they could file a motion for limited intervention, and requested a hearing on their intervention motion. But the North Carolina Supreme Court opinion states that the presumption of openness in civil proceedings did not create a right for the public to argue against the closure of a courtroom, and that the state statute concerning medical review committee materials mandated closure of the proceedings and sealing of the records regardless of whether the trial court held a hearing.

The state high court's holdings ignore the nationwide public policy concerns that affect all members of the public. Closing a category of cases—such as medical licensing cases that involve medical review materials—leads to increased public concern for what takes place behind closed doors, fosters public doubts about the private justice that certain people and entities get in the public courts, harms public debate about the issues involved in the litigation, and perhaps most devastatingly fosters an appearance of unfairness, that certain members of society can shut off access to the public courts.

It is inconceivable that this Court would allow a legislature to shut off access to a category of criminal cases, in large part because of the devastating impact that such a statute would have on public confidence in the fairness and accountability of the criminal justice system. It should not

allow legislation that cuts off access to the civil justice system for the identical public policy reasons.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

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